Supreme Court, U.S.
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No. 02-228

IN THE

Supreme Court of the United States

DANIEL ENRIGHT,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ENRIGHT'S REPLY BRIEF TO OPPOSITION

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I. THE GOVERNMENT'S OPPOSITION REINFORCES THE NEED FOR THIS COURT'S REVIEW

The government's opposition brief ("Gov. Op.") argues that this Court should let stand an opinion allowing a new flexibility between pleading and proof. If not rejected by this Court, such flexibility will surely be put to repeated prosecutorial use, assuring return of this issue. Neither the opinion below nor the government's support of it are based upon case-specific issues properly disposed of by an unpublished opinion. Rather, both state as entirely normal the proposition that the government is free to convict on any set of facts and allegations which could have been brought under the broad statutes here involved, while ignoring the quite-specific version of the offenses actually charged in the indictment.[1]

As this issue was put in sharp relief at oral argument before the Court of Appeals:

> The Court: If you prove that Enright willfully evaded PetroPlus taxes then I

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[1] As the Court of Appeals (App. 9a) correctly noted the specific charges contained in Enright's indictment:

> . . . the wording found in the conspiracy count and all the evasion counts: [defendants] knowingly, willfully, and unlawfully evaded and defeated the federal excise taxes due and owing from PetroPlus to the United States.

(Emphasis in original.) The charge was not, as the government here asserts, that Enright "schemed to evade excise taxes" generally. (Gov. Op. 2.)

> see your argument. But where did you prove that Enright willfully evaded PetroPlus taxes? He may have willfully evaded King's or someone else's taxes?
>
> The Prosecutor: Exactly, because the language "due and owing from PetroPlus" was surplusage, which could be ignored."

(See, Petition p. 23 n.12.) The Solicitor General echos this position in this Court by calling the "petitioner's knowledge . . . a superfluous requirement." (Gov. Op. at 11, n.2.)

Yet existing case law holds that "[O]nce charged, the precise manner in which an indictment is drawn cannot be ignored." United States v. Schramm, 75 F.3d 156, 162 (3rd Cir. 1996). More specifically: "the evidence must establish that the defendant entered into an agreement and knew that the agreement had the specific unlawful purpose charged in the indictment." Id. [2]

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[2] Although cited by the government for the opposite proposition (Gov. Op. 10), United States v. Wisenbaker, 14 F.3d 1022 (5th Cir. 1994) surely supports the view that charging language matters. Wisenbaker claimed that his conviction should be reversed because he had not willfully evaded his own taxes. The Court found that "the indictment contain[ed] no terms restricting it to an allegation that defendant failed to pay his own taxes." 14 F.3d at 1027. The Wisenbaker court thus surely looked to the indictment to find the parameters of the charge. Since Enright was charged only with the "knowing and willful evasion of taxes due and owing from PetroPlus." (App. 9a.) Enright's indictment contains the very limitation found not present in Wisenbaker. Moreover, despite the government's incomplete quotation from it (Gov. Op. 9), there is likewise no support for the government's

The opinion below is both new and sweeping. It needs the careful scrutiny of this Court because the prosecutorial advantage it confers will surely be used far and wide unless and until it is undone. Indeed, the advantageous proof elasticity approved below as already shown its appeal all the way up the prosecutorial chain from the local prosecutors in the District Court, through the Tax Division at the Third Circuit, to the Solicitor General in its brief to this Court.

We thus urge this Court to accept review of and reverse the opinion below. Existing law presents a level playing field that allows for an intelligent defense or, frequently, an intelligent assessment that the case cannot be defended and thus that an early plea is in order. Such existing clarity should not be abandoned in favor of a "roulette-wheel" approach, allowing conviction if the proof actually bouncing around at trial falls into any of the many charges which could have been, but were not, brought.

Conversely, if the opinion below is correct, it would present a sea-change for the defense bar. The government correctly notes that Enright framed his defense by "focusing on the language of the indictment." (Gov. Op. 8.) This is the time-honored approach by defense lawyers and surely needs an unequivocal burial if it no longer holds

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position in United States v. Townsend, 31 F.3d 262 (5th Cir. 1994), where defendant was charged generally with "attempting to evade federal excise taxes." Id. at 266. Townsend stands merely for the proposition that a defendant can be prosecuted for generally evading or helping to evade the tax of another. It does not hold or even suggest that more specific charges, once made, can be ignored at the trial in favor of what could have been charged.

fashion with a judiciary so wedded to it in the past. Only then will defense lawyers understand, as they ponder whether to recommend an early plea or a trial, that whatever the indictment specifically charges they must confront any charge that could have been brought under any statute cited in the indictment involved.

II. THE INDICTMENT'S WORDING DOES INDEED SPECIFICALLY CHARGE THE INTENT TO EVADE PETROPLUS' FEDERAL AND STATE TAXES

Not fully comfortable with its principal argument that the charging language can be ignored, the government hedges its bet by alternatively arguing that the language of the indictment is more broad, "replete with details . . . [that] put petitioner on notice of the nature of the charges so he could prepare his defense." (Gov. Op. 11, n.2.) Yet the opposite is true. [3] In the first

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[3] The government's factual statement is also a hedge, conveniently changing the specific PetroPlus-based charge to the more general "scheme to evade excise taxes." [Gov. Op. 2.] It then recites many facts that do not show the specific PetroPlus-based charges brought, but rather that Kings, not PetroPlus, was the taxpayer. Facts seen one way mean one thing, and yet, seen from another perspective, mean something else. Enright, and the IRS, thought Kings was the taxpayer. He saw himself as buying at a discount from companies which had not paid taxes and did not think his company owed those taxes. A guilty verdict in this case where the charge of "knowing and willful evasion of PetroPlus taxes" was "proved" with a jury instruction telling the jury that need not find that Enright knew PetroPlus owed the taxes, should not bless the government version of the facts as sacrosanct. Such a verdict is invalid even if the facts supported the charges. United States v. Gaudin, 515 U.S. 506 (1995). Here the government's facts do not prove the crimes charged; but might prove a charge

place, even the opinion below agrees that the charge was "the knowing and willful evasion of PetroPlus taxes." (See, note 1, supra, and App. 9a.)[4] At issue here are 14 separate, substantive, tax-evasion counts charging only that Enright "did knowingly and willfully . . . evade . . . federal excise taxes due and owing from PetroPlus." (See, e.g., JA 300; Opinion below, App. 9a.)[5]

It is simply not consistent with fair use of the English language to decouple "knowing and willful" from "taxes due and owing from PetroPlus," when both are used in a sentence containing no disjunctive modifier. Moreover, it comes way too late to accommodate the problem by changing the charge to the following:

> Petitioner acted knowingly and willfully to evade taxes, and the taxes were due and owing from PetroPlus."

(Gov. Op. 11.) (emphasis original.) This belated edit only shows that the Solicitor General sees the problem.

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which could have been brought. However, if the facts are of importance to this Court, we recite our version in the "Reply Appendix."

[4] Numbers in brackets following "JA" refer to the Joint Appendix filed with the Third Circuit. There is one omnibus conspiracy count that, in forty-two pages, specifies the objects of that conspiracy and its many overt acts. (JA 236 to 277.) While we contend that this count likewise was improperly instructed, the sentence on it has unfortunately already been served.

[5] The only other wording in these counts also limits the crime to evasion of PetroPlus taxes by alleging that the evasion was accomplished by the filing of an allegedly "false and fraudulent Quarterly Federal Excise Tax Return for PetroPlus . . . (See, e.g., JA 301.) These counts contain no conspiracy allegation.

Moreover, the ease with which the government now rearranges the language shows the vitality (and applicability) of Schramm, supra, 75 F.3d at 163-64 where, after defendant was convicted for scheming to violate a tax different than the one charged in the indictment, the Third Circuit reversed, noting that if the government had wanted to charge an intent to evade a different tax, "it easily could have, and certainly should have, done so." Id.[6]

The arguments just stated apply equally to the alleged wire-fraud scheme to evade PetroPlus taxes due and owing to the State of New Jersey.[7] That the issues are the same is shown by the observation of the Third Circuit that "our analysis applies equally to both Enright's arguments, federal and state." (App. 14, n.3.) The government's contention (Gov. Op. 13, n.3) that we have somehow not renewed our arguments

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[6] Nor can the taxpayer's identity be ignored (Gov. Op. 11) by arguing that, since the tax amount need not be precisely alleged, the specifically-stated identity of the taxpayer is equally malleable. Taxpayer identity is frequently an issue for accountants and taxpayers, not to mention courts. Indeed it was an issue in this case since Enright's position was and remains that PetroPlus was not the taxpayer, and, as the District Court found, "there's no question that the [IRS] fraud referral referrers believed Kings [not PetroPlus] was the taxpayer" (JA 2363.) It is surely no defense for an accused to take the stand and swear he is not guilty of tax evasion because, for example, he thought he had only cheated the government of $100,000, not the $250,000 charged in the indictment.

[7] The Superseding Indictment surely ties that wire-fraud scheme to PetroPlus taxes, and only PetroPlus taxes, charging that defendants "caused PetroPlus to file [Federal] and New Jersey Motor Fuels Special License "B" monthly tax returns, and New Jersey Petroleum Gross receipts tax returns which falsely reported transactions." (JA 257.)

about the variance in relation to the state-tax-based, wire-fraud charges is simply untrue. (See Enright's Petition, pp. i, 8, 9, 12, n.8, and 18, n.11.)

III. THE DECISION BELOW WAS NOT CORRECT

The government's principal argument is that the actual charge is learned not by "focusing on the language of the indictment" (Gov. Op. 8), but rather by reading the statutes involved to determine the universe of what could have been charged under them. Yet particularly with broad statutes, this has not been viewed as the proper course. See, Schramm, Wisenbaker, and Townsend, supra. See also, Stirone v. United States, 361 U.S. 212, 215-16 (1960), where this Court reversed a conviction because "after an indictment has been returned its charges may not be broadened through amendment."[8]

In United States v. Miller, 471 U.S. 130 (1985) this Court reaffirmed the principle found in Stirone, but made a distinction which bolsters Enright's position. In Miller, defendant was

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[8] The defendant in Stirone had been charged with violating the Hobbs Act (18 U.S.C. § 1951) which proscribes, in a breadth similar to the tax-evasion and wire-fraud statutes, the extortionate interference with interstate commerce. The indictment specifically charged extortion aimed at the flow of sand from out of state into Pennsylvania to be used to make a steel plant. The trial court allowed evidence offered to show that defendant had also extorted subsequent steel shipments from the plant to various states, and then instructed the jury that it could convict if the government had proved either extortion as to the incoming sand or the outgoing steel. (361 U.S. at 214.) This Court reversed.

charged with defrauding an insurance company by making various fraudulent statements. At trial, the government proved only one of them. The conviction was nevertheless proper since the "variance complained of added nothing new to the grand jury's indictment and constituted no broadening." 471 U.S. at 145. (Emphasis added.) Conversely, the switch in Enright's case from "taxes due and owing from PetroPlus" to "anyone's taxes" surely is just such a "broadening."

The opinion below departs from settled law that unfortunately was not even considered[9] by the Court of Appeals.

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[9] That law was certainly cited by Enright to the Circuit Court despite its assertion that we cited no cases at all. The government attempts to dilute the opinion's error here (revealing the lack of care the panel gave to Enright's brief), by arguing that that the statement regarding no cases "was in apparent reference to his specific analysis of whether the government was required to prove his knowledge that PetroPlus owed the federal taxes. That specific discussion (Br. 67-68) contained no citation . . ." (Gov. Op. 13.) This apology is quite a dilution of the actual assertion made below: "Enright argues that the district court improperly charged the jury on knowingly and willfully. He cites no legal authority in his two-paragraph analysis on the issue." (App. 6a and 14a.) Yet Enright cited many cases and spent well over ten pages of his brief on his legal discussion of "knowing and willful." See Enright's Petition at 22-25.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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REPLY APPENDIX

Enright was charged in the 14 evasion counts with the knowing and willful evasion of PetroPlus taxes. Not with the evasion of the taxes of anyone else, nor with a generalized conspiracy to evade taxes. He did not believe his company owed taxes Kings had not paid. He was buying from Kings, or one of its affiliates knowing that they had not paid taxes. Kings was the taxpayer. Indeed, not only did the IRS think so, but the government's factual statement repeatedly emphasizes King's role as the first seller in this non-exempt situation. Virtually everyone in the industry was buying from those who had not paid the taxes they owed. As the District Court said: "there was a whole lot of people doing this thing . . . from New York, to New Jersey, to Pennsylvania to Delaware." (JA 1683.) The government's factual recitation says that Kings had sham affiliates to which it sold, who then sold to PetroPlus. If the companies were indeed shams to be disregarded, that made Kings the taxpayer as the first seller selling in a non-exempt sale. See Petition, p. 8, n.4. Moreover, while the government here says that Enright set up these sham companies, it told the Third Circuit that these were "created by Kings." (Gov. Op. Appellate Br. at 7.) Either way, Kings was the taxpayer and Enright so believed, right or wrong.

We contend that to be the law. It is indisputably what Enright believed. Even the District Court indicated that it would dismiss the case if the government had been required to prove that Enright knew PetroPlus owed the taxes.

Enright told the IRS (before indictment) repeatedly about his concern that his sellers may not be paying their taxes, and took instructions from the IRS on how to keep records to protect himself. (Petition, p. 5.) He forthrightly testified at trial that he knew others had not paid taxes but that he did not think this made PetroPlus the taxpayer. The jury was prevented from considering his defense because it was instructed that "the belief that someone other than PetroPlus owed the taxes was not a defense." (Opinion below, App. 8-9.)

In a sense then, the government is correct that Enright "believed that the certifications would protect him . . ." (Gov. Op. 5.) What the government leaves out is that those certifications were required at the instruction of the IRS which wrote Enright in response to Enright's letters to it expressing concern that "we suggest that you request from your suppliers signed statements that all appropriate taxes have been paid." (JA 1125.) "Tax-paid" thus meant that a seller had represented to its buyer that the taxes had been paid. PetroPlus always bought tax-paid meaning it was not the taxpayer. In any event this is what Enright believed and what the IRS had in effect told him.

After all this came out at trial, the government switched its theory from the "knowing and willful evasion of PetroPlus taxes," to the assistance with the evasion of the taxes of anyone. The District Court allowed the switch. Enright had already testified that he knew Kings had not paid the taxes it was required to pay. The

switch made his defense a noose. This will happen again and again if the government is allowed to switch from what it charged to what it could have charged.